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Unauthorized uses

Discussion on unauthorized uses

Unauthorized uses of state-owned aquatic lands may result in financial losses to the public, adverse impact to the lands, hindrance to public use of the area, or potential increases in state liability. Certain uses of state-owned aquatic lands, such as short-term occupancy, recreational harvest of shellfish, private recreational docks, and non-damaging recreational use, are allowed without formal authorization. However, all leases of, long-term occupancy of, damages to, and removal of valuable material from state-owned aquatic lands must have approval from the department. Otherwise, they are unauthorized uses, and, as the proprietary manager of state-owned aquatic lands, the department is responsible for responding to them.

There are any number of potential unauthorized use issues the department could address. Issues to consider when resolving a trespass include the damage and loss of assets, administrative costs, the costs to pursue and resolve the trespass, the probability of success, and the preventive message to be sent. Because of limited department resources, staff should seek to address those concerns which represent the highest threats to the public's enjoyment of the benefits of state-owned aquatic lands.

As general priorities, greater attention should be paid to entities who are doing one or more of the following:

- # Trespassing or stealing resources;

Unauthorized uses

- # Not complying with the terms of their lease, contract, easement or agreement in a manner which does or could cause significant adverse impacts to the environment, public use and access, or current or potential neighboring activities;
- # Failing to pay rent;
- # Failing to agree to a new lease after a lease expires;
- # Exposing the department to legal liability for environmental impacts or other reasons; or
- # Conducting activities which present public safety hazards.

In general, it is the department's goal to bring an unauthorized party into compliance before seeking legal action or penalties. If that cannot be accomplished within a reasonable time after discovering the violation, or if the other party refuses to cooperate in reaching compliance, the department will pursue enforcement options. In some cases, it may not be possible or safe to wait to bring a party into compliance and it may be necessary to more quickly pursue enforcement to stop environmental damage, to stop theft of a public resource, achieve compliance with a lease, or remove a party from the land.

If the department discovers an unauthorized use of state-owned aquatic lands, notice should immediately be given to the lessee so the department can take action to remove the use or, if appropriate, get the use authorized and begin collecting rent.

The department is investigating the use of collection agencies to address failure to pay rent.

UNAUTHORIZED USES: HARVESTING OF SEAWEED

SEE: Vegetation, aquatic

UNAUTHORIZED USES: LEASE COMPLIANCE

SEE: Use authorizations

UNAUTHORIZED USES: TAKING OF SHELLFISH

SEE: Shellfish

UNAUTHORIZED USES: TRESPASS, UNAUTHORIZED USE AND OCCUPANCY, REMOVAL OF MATERIALS, WASTE AND DAMAGE

RCW 79.01.752: Lessee or contract holder guilty of misdemeanor, when.

Every person being in lawful possession of any public lands of the state, under and by virtue of any lease or contract of purchase from the state, cuts down, destroys or injures, or causes to be cut down, destroyed or injured, any timber standing or growing thereon, or takes or removes, or causes to be taken or removed, therefrom, any wood or timber lying thereon, or maliciously injures or severs anything attached thereto, or the produce thereof, or digs, quarries, mines, takes or removes therefrom, any earth, soil, clay, sand, gravel, stone, mineral or other valuable material, or causes the same to be done, or otherwise injures, defaces or damages, or causes to be injured, defaced or damaged, any such lands unless expressly authorized so to do by the lease or contract under which he holds possession of such lands, or by the provisions of law under and by virtue of which such lease or contract was issued, shall be guilty of a misdemeanor.

RCW 79.01.760: Trespass, waste, damages --Prosecutions.

(1) Every person who, without authorization, uses or occupies public lands, removes any valuable material as defined in RCW 79.01.038 from public lands, or causes waste or damage to public lands, or injures publicly owned personal property or publicly owned improvements to real property on public lands, is liable to the state for treble the amount of the damages. However, liability shall be for single damages if the department of natural resources determines, or the person proves upon trial, that the person, at time of the unauthorized act or acts, did not know, or have reason to know, that he or she lacked authorization. Damages recoverable under this section include, but are not limited to, the market value of the use, occupancy, or things removed, had the use, occupancy, or removal been authorized; and any damages caused by injury to the land, publicly owned personal property or publicly owned improvement, including the costs of restoration. In addition, the person is liable for reimbursing the state for its reasonable costs, including but not limited to, its administrative costs, survey costs to the extent they are not included in damages awarded for restoration costs, and its reasonable attorneys' fees and other legal costs. (2) This section does not apply in any case where liability for damages is provided under RCW 64.12.030, 4.24.630, 79.01.756, or 79.40.070. (3) The department of natural resources is authorized and directed to investigate all trespasses and wastes upon, and damages to, public lands of the state, and to cause prosecutions for, and/or actions for the recovery of, the same, to be commenced as is provided by law.

RCW 79.94.170: Construction of RCW 79.94.150 and 79.94.170-- Use and occupancy fee where unauthorized improvements placed on publicly owned aquatic lands.

Nothing in RCW 79.94.150 and 79.94.170 shall be construed to prevent the assertion of public ownership rights in any publicly owned aquatic lands, or the leasing of such aquatic lands when such leasing is not contrary to the state-wide public interest. The department of natural resources may require the payment of a use and occupancy fee in lieu of a lease where improvements have

been placed without authorization on publicly owned aquatic lands. [1982 1st ex.s. c 21 § 102.]

WAC 332-30-127: Unauthorized use and occupancy of aquatic lands (see RCW 79.01.471).

(1) Aquatic lands determined to be state owned, but occupied for private use through accident or without prior approval, may be leased if found to be in the public interest.

(2) Upon discovery of an unauthorized use of aquatic land, the responsible party will be immediately notified of his status. If the use will not be authorized, he will be served notice in writing requiring him to vacate the premises within thirty days. If the law and department policy will permit the use, the occupant is to be encouraged to lease the premises.

(3) The trespassing party occupying aquatic lands without authority will be assessed a monthly use and occupancy fee for such use beginning at the time notification of state ownership is first provided to them and continuing until they have vacated the premises or arranged for a right to occupy through execution of a lease as provided by law.

(4) The use and occupancy fee is sixty percent higher than full fair market rental and is intended to encourage either normal leasing or vacation of aquatic land.

(5) In those limited circumstances when a use cannot be authorized by a lease even though it may be in the public interest to permit the structure or activity, the fair market rental will be charged and billed on an annual basis.

(6) The use and occupancy billing is to be made after the use has occurred and conveys no rights in advance. Payment is due by the tenth of the month following the original notification, and if not received, a notice is to be sent. If payment is not received within thirty days of this notice and monthly thereafter by the tenth of each month during the period of the use and occupancy lease or if the improvement has not been removed from the aquatic land, an unlawful detainer action against the party in trespass will be filed along with an action to collect past due rental.

Discussion on unauthorized uses: trespass, unauthorized use and occupancy, removal of materials, waste, and damage

It is considered trespass on state-owned aquatic lands if an individual or entity, public or private, is found to be occupying state lands for their exclusive use, without prior approval from the department. Examples of trespass include building a pier, bulkhead, or outfall without use authorization, or taking up long-term residence or moorage without authorization. Keep in mind that some trespassers may have received the necessary permits from regulatory agencies to conduct their activities, but have not realized that they also need to get authorization from the department. SEE ALSO: Regulatory agencies and permits.

An exception is private recreational docks, which do not need a use authorization document from the department, provided they meet certain conditions. SEE ALSO: Recreational docks, private.

It is the department's goal to avoid trespass on state-owned aquatic lands as often as possible through prevention and education, and to pursue resolution of the situation without taking legal action whenever possible. In all situations, no matter whether the trespass is innocent or willful, staff should seek a solution that is in the best interests of the state, not necessarily of the trespasser.

Staff should follow these general steps in the case of trespass:

- # Once an unauthorized use is discovered, immediately notify the party of the violation, then work to arrange a lease if the use is in the public interest and complies with all legal requirements.
- # Until the lease is agreed upon, the trespassing party will be assessed a monthly use and occupancy fee for their use beginning at the time they receive their notice of trespass. This interim rental rate will continue until they vacate the site or arrange for a lease. To encourage the signing of a lease, this fee will be 60percent higher than fair market value.

- # If the use is found to be incompatible and will not be authorized, the party will be served written notice to vacate the premises within thirty days. The trespassing party will be assessed a monthly use and occupancy fee for their use beginning at the time they receive their notice of trespass and continuing until they vacate the site.
- # If the tenant is unwilling or hesitant to sign a lease, staff should attempt to communicate the following:
 - That any reasonable landlord (as with a house or other property) would proceed with trespass and eviction proceedings against a tenant who refuses to sign a lease.
 - The model lease is commercially reasonable and results from a thorough process to draft a lease that represents an appropriate balance of risk and liability for the department and the tenants.
 - An outside law firm and an advisory committee of private attorneys who represent aquatic tenants reviewed and edited the draft lease.
 - The department's commercial lease is comparable to commercial real estate leases, and other tenants across the state are signing it.

If the occupant still refuses to sign the lease, legal proceedings will be necessary. The department's objective is to use uniform and fair application of the lowest level of enforcement required to achieve compliance. Contact should be made through appropriate processes with the Attorney General's Office to commence legal proceedings.

In the case of any actual or threatened act of violence to any person, illegal public behavior, and acts of theft and vandalism, staff should immediately notify local law enforcement authorities.

UNAUTHORIZED USES: USES OF OTHER AGENCIES OR LAW ENFORCEMENT

Discussion on unauthorized uses: use of other agencies or law enforcement

The department's objective is to use uniform and fair application of the most appropriate level of enforcement required to achieve compliance. Staff will cooperate with other agencies having enforcement responsibility and will promptly notify local law enforcement authorities of all acts of actual or threatened violence, illegal public behavior, and acts of theft and vandalism. (Policy PO22-001)

- # For emergencies or actual or threatened violence, contact the appropriate law enforcement agency.
- # For violations affecting fish and wildlife (e.g., geoducks, salmon, etc.), including illegal harvest of geoducks, immediately contact the regional Washington Department of Fish and Wildlife (WDFW) office.
- # For violations occurring within the waters of the state that are either in violation of an issued Hydraulic Project Approval (HPA) or conducted without an HPA, contact the regional WDFW office. Any project using, diverting, obstructing or changing the flow of water is subject to an HPA.
- # For discharge violations (e.g., presence of an unpermitted outfall or of other discharges affecting water quality), contact the regional Department of Ecology office.
- # For unauthorized expansion of docks and other structures, contact the city or county to see whether necessary shoreline or other permits have been issued or whether a hydraulics permit has been issued by WDFW.

- # For activities which appear to be contrary to the area's zoning, contact the city or county to see whether the activity has been permitted.

Use and occupancy fee

SEE: Unauthorized uses.

Use authorizations

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(4) The power to lease state-owned aquatic lands is vested in the department of natural resources, which has the authority to make leases upon terms, conditions, and length of time in conformance with the state Constitution and chapters 79.90 through 79.96 RCW.

(5) State-owned aquatic lands shall not be leased to persons or organizations which discriminate on the basis of race, color, creed, religion, sex, age, or physical or mental handicap.

RCW 79.90.410: Reconsideration of official acts.

The department of natural resources may review and reconsider any of its official acts relating to the aquatic lands of the state until such time as a lease, contract, or deed shall have been made, executed, and finally issued, and the department may recall any lease, contract, or deed issued for the purpose of correcting mistakes or errors, or supplying omissions.

WAC 332-30-106 Definitions.

(7) "Authorization instrument" means a lease, material purchase, easement, permit, or other document authorizing use of state-owned aquatic lands and/or materials.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) General requirements.

(a) In addition to other requirements of law, aquatic land activities that interfere with the use by the general public of an area will require authorization from the department by way of agreement, lease, permit, or other instrument.

(i) Suitable instruments shall be required for all structures on aquatic lands except for those federal structures serving the needs of navigation.

(ii) The beds of navigable waters may be leased to the owner or lessee of the abutting tideland or shoreland. This preference lease right is limited to the area between the landward boundary of the beds and the -3 fathom contour, or 200 feet waterward, whichever is closer to shore. However, the distance from shore may be less in locations where it is necessary to protect the navigational rights of the public.

(iii) When proposing to lease aquatic lands to someone other than the abutting property owner, that owner shall be notified of the intention to lease the area. When not adverse to the public's ownership, the abutting owner's water access needs may be reasonably accommodated.

Discussion on use authorizations

The Legislature has granted broad proprietary authority to the department for leasing. Unlike regulatory actions, proprietary authority means that the department acts as a manager who leases the land to tenants on behalf of the owners – the current and future citizens of the state – rather than as a regulator of private lands.

USE AUTHORIZATIONS: ASSIGNMENTS

RCW 79.90.370: Assignment of contracts or leases.

All contracts of purchase of tidelands or shorelands belonging to the state, otherwise permitted under RCW 79.94.150 to be sold, and all leases of tidelands, shorelands, or beds of navigable waters belonging to the state issued by the department of natural resources shall be assignable in writing by the contract holder or lessee. The assignee shall be subject to the provisions of law applicable to the purchaser, or lessee, of whom he is the assignee, and shall have the same rights in all respects as the original purchaser, or lessee, of the lands, but only if the assignment is first approved by the department and entered upon the records in the office of the commissioner of public lands.

Discussion on use authorizations: assignments

Lessees may assign their lease to a new person, but only with approval of the department. Before approving an assignment, the department should consider any amendments or conditions that may better provide for environmental protection or the other public benefits of state-owned aquatic lands. The department will require any amendments or conditions that might be applied to a new lease and that are necessary to address new concerns. SEE ALSO: Public benefits.

An assignment of a lease requires approval from the same authority who signed the original lease. SEE ALSO: Chapter Two, Delegation of authority.

USE AUTHORIZATIONS: DETERMINATION OF USE IN AREA

WAC 332-30-122: Aquatic land use authorization.

(1) General requirements

(b) Determination of the area encumbered by an authorization for use shall be made by the department based on the impact to public use and subsequent management of any remaining unencumbered public land.

- (i) Operations involving fixed structures will include the area physically encumbered plus the open water area needed to operate the facility.
- (ii) Areas for individual mooring buoys will be a circle with a radius equal to the expected swing of the vessel or object moored. Only the area encumbered at any given point in time shall be used to calculate any rentals due.
- (iii) Areas for utility line easements will normally be ten feet wider than the overall width of the structure(s) placed in the right of way.

Discussion on use authorizations: determination of use area

When leasing aquatic lands, the department will determine the area of the lease. This area will include both the area physically encumbered plus the area needed to normally operate the facility or conduct the activity. Also, when determining the area, the department must take into account the impact to public use and to future management options for surrounding state-owned aquatic lands.

The area covered by a use authorization is based on the total area of encumbered use, not by the physical size of an installed structure. For example, the mooring buoy area is the entire swing radius needed for mooring a boat. Also, marinas and docks should lease the area needed to allow ingress and egress for boats between the facility and open water. Utility lines require ten feet on either side, or whatever distance is necessary to protect both the utility line and neighboring uses. SEE ALSO: Mooring buoys and swim rafts; Marinas and moorage facilities; Utility lines.

USE AUTHORIZATIONS: FOR IMPROVEMENTS

SEE: Improvements

USE AUTHORIZATIONS: FOR MARINAS

See: Marinas and moorage facilities

USE AUTHORIZATIONS: FOR MOORING BUOYS

SEE: Mooring buoys and swim rafts

USE AUTHORIZATIONS: FOR NONWATER-DEPENDENT USES

SEE: Nonwater-dependent uses

USE AUTHORIZATIONS: FOR PUBLIC USE AND ACCESS

SEE: Public use and access

USE AUTHORIZATIONS: FOR RESIDENTIAL USES

SEE: Residential uses

USE AUTHORIZATIONS: FOR SHELLFISH CULTIVATION OR OTHER AQUACULTURE

SEE: Aquaculture

USE AUTHORIZATIONS: FOR WATER-DEPENDENT USES

SEE: Water-dependent uses

USE AUTHORIZATIONS: FOR WATER-ORIENTED USES

SEE: Water-oriented uses

USE AUTHORIZATIONS: HOLD-OVER STATUS**Discussion on use authorizations: hold-over status**

If a lessee fails to extend a lease at the end of the term, continues to occupy the state-owned aquatic lands, and has not received proper instructions to vacate the lands, the lessee is called a “hold-over tenant.” If the lease is in hold-over status, the tenant is lawfully using the property and is not a trespasser.

A hold-over tenancy can arise in two situations. First, there could be an approved hold-over tenancy if the tenant signed a hold-over letter. Second, the department's acceptance of a tenant's rent after expiration of the lease can be deemed by a court to be an implied hold-over.

The department should not allow hold-over tenancy to occur without deliberate discussions or rationale. It is the department's goal to keep all leases current, rather than allowing leases to continue beyond the expiration of the lease. This goal includes eliminating any leases in the hold-over status.

If the tenant has either an approved or implied hold-over, staff should send the tenant a certified letter providing at least 30 days to enter into a lease or vacate the property. This time period may be extended to no more than 60 days if

a survey, plans of operation, or other documentation is required. Staff should advise the tenant that after the proper period expires, he or she will be in trespass and subject to eviction. For information on trespassing, SEE ALSO: Unauthorized uses.

USE AUTHORIZATIONS: INSURANCE, BONDS, AND OTHER SECURITY

RCW 79.90.525: Aquatic lands--Security for leases for more than one year.

For any lease for a term of more than one year, the department may require that the rent be secured by insurance, bond, or other security satisfactory to the department in an amount not exceeding two years' rent. The department may require additional security for other lease provisions. The department shall not require cash deposits exceeding one-twelfth of the annual rental.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(5) Insurance, bonds, and other security.

(a) The department may require authorized users of aquatic lands to carry insurance, bonding, or provide other forms of security as may be appropriate for the use or uses occurring on public property, in order to ensure its sustained utility and future value.

(b) Proof of coverage shall be acceptable to the department if provided by any of the following:

- (i) Insurance and/or bonding companies licensed by the state;
- (ii) Recognized insurance or bonding agent for the authorized user;

- (iii) Savings account assignment from authorized user to department; or
- (iv) Cash deposit.

(c) The amount of security required of each user shall be determined by the department and adjusted periodically as needed.

(i) Any portion of the required security relating to payment of rent or fees shall be limited to an amount not exceeding two year's rental or fees.

(ii) Required security related to other terms of the agreement shall be based on the estimated cost to the department of enforcing compliance with those terms.

(iii) Cash deposits shall not be required in an amount exceeding one-twelfth of the annual rental or fees. If this amount is less than the total required security, the remainder shall be provided through other forms listed in

(b) of this subsection.

(d) Security must be provided on a continual basis for the life of the agreement. Security arrangements for less than the life of the agreement shall be accepted as long as those arrangements are kept in force through a series of renewals or extensions.

USE AUTHORIZATIONS: LEASE COMPLIANCE

Discussion on use authorizations: lease compliance

To best provide for the public benefits of state-owned aquatic lands, the department must keep lessees in compliance with applicable lease, easement or contract terms. Therefore, it is important that staff monitor all leases, contracts, and other agreements for compliance with the terms.

Monitoring for compliance is an on-going task to be completed primarily by land managers in the field. Monitoring involves routinely reviewing all leases to ensure compliance. Inspecting for compliance takes place "on-site" to make sure

the user is operating under the terms and conditions of the use authorization. All reviews should include documentation of findings, including both written summaries and photographs.

When monitoring for lease compliance, staff should follow these general steps:

- # First, review the use authorization, particularly the “Permitted Use” and the “Restrictions on Use” sections to understand the terms and conditions of the contract. Also, staff should review the survey or exhibit to verify that the improvements and trade fixtures are contained within the leasehold area. This review should cover the entire file, including all permits and any plan of development or operation.
- # Based upon the permitted use, determine whether the use and the improvements are consistent with the use authorization. For example, consider a lease where the permitted use is for vessel moorage only, where, during the inspection, houseboats are found occupying the leasehold. The houseboat use is not consistent with the use authorization. Therefore, the user is not in compliance with the permitted use section of the lease authorization terms, and a notice of non-compliance must be sent.
- # If necessary, examine and measure the physical improvements to ensure they are still consistent with the original lease terms. If they are not consistent, a letter of non-compliance should go to the lessee.
- # Review the use authorization and regulatory permits for special requirements such as pump-outs and fuel docks. Ensure that adequate safeguards are in place and functioning properly and that the user is in compliance with all permits. If there are questions or concerns, contact the appropriate permitting agency.

- # Ensure that the lessee is conforming to all applicable laws, regulations and permits affecting the use and occupation of the leasehold. Again, staff should review the lease jacket and note any requirements issued prior to the original authorization before conducting an on-site visit. In some instances, monitoring may uncover violations of permits issued by regulatory agencies, such as the Department of Ecology. When this happens, staff must report these violations to the appropriate agency. SEE ALSO: Regulatory agencies and permits.
- # Notify someone with expertise if it is suspected that the lessee is not complying with the specific technical-oriented environmental provisions of the lease or of specific laws. This will help ensure that any hazardous, toxic or harmful substances on the site are in compliance with lease terms and the requirements of other agencies. If the lessee is not in compliance, notify the Department of Ecology's regional office or the Hazardous Substance Information line at 800-633-7585. Observing oil on the water or drum barrels sitting on the docks are examples of indications of hazards. SEE ALSO: Regulatory agencies and permits.
- # Confirm that the lessee has not granted any rights to a third party, such as a sublease, without prior authorization.
- # Verify that improvements are maintained and in compliance with all applicable building and zoning codes, and shoreline management, health, safety and environmental laws, and other legal requirements. For example, if pilings are broken or deteriorating, staff should identify that the pilings need to be replaced or fixed. Newer leases should contain a “Plan of Development, Operation and Maintenance.” Staff should ensure compliance with the approved plan, including repairs, upgrades, scheduled inspections, etc.

- # Identify any obvious health or safety hazards (i.e., wiring, rotting walkways, broken pilings, etc.). If any hazards are identified, contact the user and require compliance. Later, staff should follow up to confirm the hazard has been corrected by contacting the regulatory agency for confirmation or doing another on-site visit.
- # If human health or the environment are at imminent risk, immediately take whatever steps are appropriate to protect health and safety.
- # Once non-compliance has been identified, develop a time-frame for correcting the deficiencies, then follow up with either an on-site inspection or obtain proof that deficiencies have been corrected.

When a lessee fails to adhere to the terms and conditions of the lease, including rent payments and insurance obligations, this may result in a “default” or breach of contract. In most cases, the tenant is formally in breach once the department so notifies the tenant. Generally, a tenant may be in default or breach of contract when any of the following situations occur:

- # Failure to pay annual rent or other expenses when due.
- # Failure to comply with any appropriate law, regulation, policy, or order of any governmental authority.
- # Failure to comply with any other provision in the contract.
- # Proceedings are commenced by or against the tenant under any bankruptcy act or for the appointment of a trustee or receiver of tenants' property. This final item is important because there may be a limited "window of opportunity" to recover debt from a tenant in bankruptcy. Although federal law prevents a landlord from declaring a tenant in default and terminating solely on the basis of

a bankruptcy, this may be the best opportunity to take appropriate action to force the lessee to cure the default.

When a default occurs, staff must give the tenant written notice of the default, and demand that it be corrected. If the tenant does not correct the default within the designated time period for doing so, the department will try and bring the tenant into compliance with the terms and conditions of the lease. There are several steps for doing this, including:

- # Review the use authorization document for lease terms and conditions. Once familiar with this, document the violation in writing, sending a copy to the Region Manager. Photographing the violation (e.g., expansion of dock beyond what was originally authorized, presence of outfall, harvest of geoducks, etc.) is strongly recommended.
- # Notify the tenant of the violation both in writing (via certified mail with a return receipt), and, if possible, in person or by telephone. The tenant may volunteer to correct the violation immediately. In these cases, work with the tenants to help bring them into compliance. Advise them they have a number of days as specified in the lease (typically 10 days for rent, 30 or 60 days for other defaults) to submit delinquent payments and other defaults.
- # It is also important for staff to notify any lenders of record that have a secured interest in the lease. The lender may wish to cure the default to protect its collateral.

If the tenant does not rectify the problem within the allotted time frame, staff, in consultation with the Region Manager and others as necessary, may initiate the procedures for legal action against the tenant (see Procedure No. 3-01, 12/9/97) or take another course of definitive action appropriate to the circumstances. However, if the lease violation is resulting in imminent harm to the lands or resources, it may be

necessary to enlist the help of enforcement officials or the help of other agencies to halt the activity immediately.

If a lease has been assigned and the assignee is violating the terms of the lease, staff should also contact the assignor, as they may have a continuing interest in the lease.

The department may call in the tenant's security bond if the tenant is in default or is otherwise violating lease conditions.

USE AUTHORIZATIONS: LEASE CONDITIONS

Discussion on use authorizations: lease conditions

Another key part of the department's authority is that the department will only lease state-owned aquatic lands "if the department of natural resources shall deem it for the best public interest to offer said [lands] for lease." Also, "the department shall, prior to the issuance of any lease...prescribe the terms and conditions of the lease." These quotes are from RCW 79.94.070 and RCW 79.94.280 on first class shorelands and tidelands, but virtually identical language also applies to all other state-owned aquatic lands.

The purpose and effect of this authority is that the department can and will be creative and flexible in leasing in order to provide for the public benefits of state-owned aquatic lands. Our obligation is not to lease lands; it is to best manage them for the public, which may or may not include leasing a particular parcel for a particular use.

Furthermore, our obligation is to the entire public. The department must manage state-owned aquatic lands not just for the convenience of lessees, but for all the citizens of the state. To do this, the department will require all conditions necessary within a lease to best provide for the public benefits of state-owned aquatic lands. SEE ALSO: Public benefits.

USE AUTHORIZATIONS: LEASE OF BEDLANDS

RCW 79.95.010: Lease of beds of navigable waters.

Except as provided in RCW 79.95.060, the department of natural resources may lease to the abutting tide or shore land owner or lessee, the beds of navigable waters lying below the line of extreme low tide in waters where the tide ebbs and flows, and below the line of navigability in lakes and rivers claimed by the state and defined in section 1, Article XVII, of the Constitution of the state. In case the abutting tide or shore lands or the abutting uplands are not improved or occupied for residential or commercial purposes, the department may lease such beds to any person for a period not exceeding ten years for booming purposes. Nothing in this chapter shall change or modify any of the provisions of the state Constitution or laws of the state which provide for the leasing of harbor areas and the reservation of lands lying in front thereof. [Note: The exception provided for in RCW 79.95.060 applies only to the United States Navy in Port Gardner Bay.]

RCW 79.95.020: Lease of beds of navigable waters--Terms and conditions of lease--Forfeiture for nonuser.

The department of natural resources shall, prior to the issuance of any lease under the provisions of this chapter, fix the annual rental and prescribe the terms and conditions of the lease: PROVIDED, That in fixing such rental, the department shall not take into account the value of any improvements heretofore or hereafter placed upon the lands by the lessee. No lease issued under the provisions of this chapter shall be for a term longer than thirty years from the date thereof if in front of second class tide or shore lands; or a term longer than ten years if in front of unplatted first class tide or shore lands leased under the provisions of RCW 79.94.280, in which case said lease shall be subject to the same terms and conditions as provided for in the lease of such unplatted first class tide or shore lands. Failure to use those beds leased under the provisions of this chapter for booming purposes, for a period of two years shall work a forfeiture of said lease and the land shall revert to the state without notice to the lessee upon the

entry of a declaration of forfeiture in the records of the commissioner of public lands.

RCW 79.95.030: Lease of beds of navigable waters--Improvements--Federal permit--Forfeiture--Plans and specifications.

The applicant for a lease under the provisions of this chapter shall first obtain from the United States Army Corps of Engineers or other federal regulatory agency, a permit to place structures or improvements in said navigable waters and file with the department of natural resources a copy of said permit. No structures or improvements shall be constructed beyond a point authorized by the Corps of Engineers or the department of natural resources and any construction beyond authorized limits will work a forfeiture of all rights granted by the terms of any lease issued under the provisions of this chapter. The applicant shall also file plans and specifications of any proposed improvements to be placed upon such areas with the department of natural resources, said plans and specifications to be the same as provided for in the case of the lease of harbor areas.

RCW 79.95.040: Lease of beds of navigable waters--Preference right to re-lease.

At the expiration of any lease issued under the provisions of this chapter, the lessee or his successors or assigns, shall have a preference right to re-lease the area covered by the original lease or any portion thereof if the department of natural resources deems it to be in the best interest of the state to re-lease the same. Such re-lease shall be for such term as specified by the provisions of this chapter, and at such rental and upon such conditions as may be prescribed by the department: PROVIDED, That if such preference right is not exercised, the rights and obligations of the lessee, the department of natural resources, and any subsequent lessee shall be the same as provided in RCW 79.94.320 relating to failure to re-lease tide or shore lands. Any person who prior to June 11, 1953, had occupied and improved an area subject to lease under this chapter and has secured a permit for such improvements from the United States Army Corps of Engineers, or other federal regulatory agency, shall have the rights and obligations of a lessee under this section upon the filing of a

copy of such permit together with plans and specifications of such improvements with the department of natural resources.

USE AUTHORIZATIONS: LEASE OF HARBOR AREAS OR WATERWAYS

Discussion on use authorizations: lease of harbor areas or waterways.

Leases in harbor areas and waterways are similar to other leases, but also follow many unique rules. SEE ALSO: Harbor areas; Waterways.

USE AUTHORIZATIONS: LEASE OF TIDELANDS AND SHORELANDS

RCW 79.94.070: Tidelands and shorelands of the first class-- Preference right of upland owner--How exercised.

Upon platting and appraisal of tidelands or shorelands of the first class as in this chapter provided, if the department of natural resources shall deem it for the best public interest to offer said tide or shore lands of the first class for lease, the department shall cause a notice to be served upon the owner of record of uplands fronting upon the tide or shore lands to be offered for lease if he be a resident of the state, or if he be a nonresident of the state, shall mail to his last known post office address, as reflected in the county records, a copy of the notice notifying him that the state is offering such tide or shore lands for lease, giving a description of those lands and the department's appraised fair market value of such tide or shore lands for lease, and notifying such owner that he has a preference right to apply to lease said tide or shore lands at the appraised value for the lease thereof for a period of sixty days from the date of service of mailing of said notice. If at the expiration of sixty days from the service or mailing of the notice, as above provided, there being no conflicting applications filed, and the owner of the uplands fronting upon the tide or shore lands offered for lease, has failed to avail himself of his preference right to apply to lease or to pay to the department the appraised value

for lease of the tide or shore lands described in said notice, then in that event, said tide or shore lands may be offered for lease to any person and may be leased in the manner provided for in the case of lease of state lands. If at the expiration of sixty days two or more claimants asserting a preference right to lease shall have filed applications to lease any tract, conflicting with each other, the conflict between the claimants shall be equitably resolved by the department of natural resource[s] as the best interests of the state require in accord with the procedures prescribed by chapter 34.05 RCW: PROVIDED, That any contract purchaser of lands or rights therein, which upland qualifies the owner for a preference right under this section, shall have first priority for such preference right.

RCW 79.94.150: First and second class tidelands and shorelands and waterways of state to be sold only to public entities-- Leasing--Limitation.

(1) This section shall apply to:

- (a) First class tidelands as defined in RCW 79.90.030;
- (b) Second class tidelands as defined in RCW 79.90.035;
- (c) First class shorelands as defined in RCW 79.90.040;
- (d) Second class shorelands as defined in RCW 79.90.045, except as included within RCW 79.94.210;
- (e) Waterways as described in RCW 79.93.010.

(3) Tidelands and shorelands enumerated in subsection (1) of this section may be leased for a period not to exceed fifty-five years: PROVIDED, That nothing in this section shall be construed as modifying or canceling any outstanding lease during its present term.

RCW 79.94.260: Second class shorelands--Sale or lease when in best public interest--Preference right of upland owner--Procedure upon determining sale or lease not in best public interest or where transfer made for public use--Platting.

If application is made to purchase or lease any shorelands of the second class and the department of natural resources shall deem it for the best public interest to offer said shorelands of the second class for sale or lease, the department shall cause a notice to be served upon the abutting upland owner if he be a resident of the state, or if the upland owner be a nonresident of the state, shall

mail to his last known post office address, as reflected in the county records a copy of a notice notifying him that the state is offering such shorelands for sale or lease, giving a description of the department's appraised fair market value of such shorelands for sale or lease, and notifying such upland owner that he has a preference right to purchase, if such purchase is otherwise permitted under RCW 79.94.150, or lease said shorelands at the appraised value thereof for a period of thirty days from the date of the service or mailing of said notice. If at the expiration of the thirty days from the service or mailing of the notice, as provided in this section, the abutting upland owner has failed to avail himself of his preference right to purchase, as otherwise permitted under RCW 79.94.150, or lease, or to pay to the department the appraised value for sale or lease of the shorelands described in said notice, then in that event, except as otherwise provided in this section, said shorelands may be offered for sale, when otherwise permitted under RCW 79.94.150, or offered for lease, and sold or leased in the manner provided for the sale or lease of state lands, as otherwise permitted under this chapter. The department of natural resources shall authorize the sale or lease, whether to abutting upland owners or others, only if such sale or lease would be in the best public interest and is otherwise permitted under RCW 79.94.150. It is the intent of the legislature that whenever it is in the best public interest, the shorelands of the second class managed by the department of natural resources shall not be sold but shall be maintained in public ownership for the use and benefit of the people of the state. In all cases where application is made for the lease of any second class shorelands adjacent to upland, under the provisions of this section, the same shall be leased per lineal chain frontage, and the United States field notes of the meander line shall accompany each application as required for the sale of such lands, and when application is made for the lease of second class shorelands separated from the upland by navigable waters, the application shall be accompanied by the plat and field notes of a survey of the lands applied for, as required with applications for the purchase of such lands. If, following an application by the abutting upland owner to either purchase as otherwise permitted under RCW 79.94.150 or to obtain an exclusive lease at appraised full market value or rental, the department deems that such sale or lease is not in the best public interest, or if property rights in state-owned

second class shorelands are at any time withdrawn, sold, or assigned in any manner authorized by law to a public agency for a use by the general public, the department shall within one hundred and eighty days from receipt of such application to purchase or lease, or on reaching a decision to withdraw, sell or assign such shorelands to a public agency, and:

- (1) Make a formal finding that the body of water adjacent to such shorelands is navigable;
- (2) find that the state or the public has an overriding interest inconsistent with a sale or exclusive lease to a private person, and specifically identify such interest and the factor or factors amounting to such inconsistency; and
- (3) provide for the review of said decision in accordance with the procedures prescribed by chapter 34.05 RCW. Notwithstanding the above provisions, the department may cause any of such shorelands to be platted as is provided for the platting of shorelands of the first class, and when so platted such lands shall be sold, when otherwise permitted under RCW 79.94.150 to be sold, or leased in the manner provided for the sale or lease of shorelands of the first class.

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

The department of natural resources is authorized to lease to the abutting upland owner any unplatted first class tide or shore lands. The department shall, prior to the issuance of any lease under the provisions of this section, fix the annual rental for said tide or shore lands and prescribe the terms and conditions of the lease. No lease issued under the provisions of this section shall be for a longer term than ten years from the date thereof, and every such lease shall be subject to termination upon ninety days' notice to the lessee in the event that the department shall decide that it is in the best interest of the state that such tide or shore lands be surveyed and platted. At the expiration of any lease issued under the provisions of this section, the lessee or his successors or assigns shall have a preference right to re-lease the lands covered by the original lease or any portion thereof, if the department shall deem it to be in the best interests of the state to re-lease the same, for succeeding periods not exceeding five years each at such rental and upon such terms and

conditions as may be prescribed by said department. In case the abutting uplands are not improved and occupied for residential purposes and the abutting upland owner has not filed an application for the lease of such lands, the department may lease the same to any person for booming purposes under the terms and conditions of this section: PROVIDED, That failure to use for booming purposes any lands leased under this section for such purposes for a period of one year shall work a forfeiture of such lease and such land shall revert to the state without any notice to the lessee upon the entry of a declaration of forfeiture in the records of the department of natural resources.

RCW 79.94.290: Second class tide or shore lands--Lease for booming purposes.

The department of natural resources is authorized to lease any second class tide or shore lands, whether reserved from sale, or from lease for other purposes, by or under authority of law, or not, except any oyster reserve containing oysters in merchantable quantities, to any person, for booming purposes, for any term not exceeding ten years from the date of such lease, for such annual rental and upon such terms and conditions as the department may fix and determine, and may also provide for forfeiture and termination of any such lease at any time for failure to pay the fixed rental or for any violation of the terms or conditions thereof. The lessee of any such lands for booming purposes shall receive, hold, and sort the logs and other timber products of all persons requesting such service and upon the same terms and without discrimination, and may charge and collect tolls for such service not to exceed seventy-five cents per thousand feet scale measure on all logs, spars, or other large timber and reasonable rates on all other timber products, and shall be subject to the same duties and liabilities, so far as the same are applicable, as are imposed upon boom companies organized under the laws of the state: PROVIDED, That failure to use any lands leased under the provisions of this section for booming purposes for a period of one year shall work a forfeiture of such lease, and such lands shall revert to the state without any notice to the lessee upon the entry of a declaration of forfeiture in the records of the department. At the expiration of any lease issued under the provisions of this section, the lessee shall have the preference right to re- lease the lands covered by his original lease for a further term, not

exceeding ten years, at such rental and upon such terms and conditions as may be prescribed by the department of natural resources. [1982 1st ex.s. c 21 § 114.]

RCW 79.94.320: Tide or shore lands of the first or second class--Failure to re-lease tide or shore lands--Appraisal of improvements.

In case any lessee of tide or shore lands, for any purpose except mining of valuable minerals or coal, or extraction of petroleum or gas, or his successor in interest, shall after the expiration of any lease, fail to purchase, when otherwise permitted under RCW 79.94.150 to be purchased, or re-lease from the state the tide or shore lands formerly covered by his lease, when the same are offered for sale or re-lease, then and in that event the department of natural resources shall appraise and determine the value of all improvements existing upon such tide or shore lands at the expiration of the lease which are not capable of removal without damage to the land, including the cost of filling and raising said property above high tide, or high water, whether filled or raised by the lessee or his successors in interest, or by virtue of any contract made with the state, and also including the then value to the land of all existing local improvements paid for by such lessee or his successors in interest. In case the lessee or his successor in interest is dissatisfied with the appraised value of such improvements as determined by the department, he shall have the right of appeal to the superior court of the county wherein said tide or shore lands are situated, within the time and according to the method prescribed in RCW 79.90.400 for taking appeals from decisions of the department. In case such tide or shore lands are leased, or sold, to any person other than such lessee or his successor in interest, within three years from the expiration of the former lease, the bid of such subsequent lessee or purchaser shall not be accepted until payment is made by such subsequent lessee or purchaser of the appraised value of the improvements as determined by the department, or as may be determined on appeal, to such former lessee or his successor in interest. In case such tide or shore lands are not leased, or sold, within three years after the expiration of such former lease, then in that event, such improvements existing on the lands at the time of any subsequent lease, shall belong to the state and be considered a part of the land, and shall be taken into

consideration in appraising the value, or rental value, of the land and sold or leased with the land.

USE AUTHORIZATIONS: LENGTH OF TERM

RCW 79.94.150: First and second class tidelands and shorelands and waterways of state to be sold only to public entities-- Leasing--Limitation.

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

RCW 79.95.010: Lease of beds of navigable waters.

RCW 79.95.020: Lease of beds of navigable waters--Terms and conditions of lease--Forfeiture for nonuser.

[Note: The full texts of these RCWs is printed above under *Lease of tidelands and shorelands* and *Lease of bedlands*.]

Discussion on use authorizations: length of term

In summary of the above RCWs:

- # Tidelands and shorelands may be leased for up to 55 years. Except, first class unplatted tidelands and shorelands may be leased for up to 10 years.
- # Bedlands abutting second class tidelands or shorelands may be leased for up to 30 year. Except, unimproved bedlands abutting second class tidelands or shorelands may be leased to any person for up to 10 years for log booming purposes.

- # Bedlands abutting first class unplatted tidelands or shorelands may be leased for up to 10 years, under the same conditions as for those tidelands or shorelands.

The department generally does not grant leases for longer than 30 years. It may grant a lease for up to 100 years for major public facilities. The department does not grant perpetual easements under any circumstances.

Any lease for longer than 12 years, including leases with renewal options totaling more than 12 years, require final approval from the Commissioner of Public Lands. SEE ALSO: Chapter Two, Delegation of authority.

USE AUTHORIZATIONS: PLAN OF OPERATIONS

Discussion on use authorizations: plan of operations

Exhibit B of the standard use authorization form calls for a plan of operations. The purpose of this document is to ensure that the lessee properly plans how the site will be used over the term of the lease and also documents the short and long-term objectives for the site. Staff should work with the proponent to develop the plan of operations to make sure that the department's needs and concerns for the long-term use of the site are properly addressed. In some cases, the applicant may already have a plan of operations, also sometimes called an operation and maintenance manual. In this case, staff should review the existing manual to determine if anything should be added or amended to meet department goals.

As part of this process, staff should walk the site with the proponent and look for opportunities to improve the proposal to better provide for the public benefits of state-owned aquatic lands and better meet the department's stewardship

responsibilities. The plan of operations should provide for documentation of the actions, mitigation, maintenance and improvements that will occur and when, so that the site can be monitored appropriately.

"Best management practices" and "all known and reasonable technology" set by regulatory agencies for the use requested should be required as minimum standards, and should be included in the plan of operations or elsewhere in the documentation of the agreement. SEE ALSO: Regulatory agencies and permits.

When appropriate, the plan of operations should also include:

- A maintenance schedule.
- An emergency management plan, indicating the required response to spills, leaks or similar occurrences.
- Steps to be taken to ensure environmental protection, such as a sediment sampling plan, pressure testing schedule and other monitoring plans. SEE ALSO: Environmental protection.

USE AUTHORIZATIONS: PREFERENCE RIGHTS FOR LEASING

RCW 79.94.070: Tidelands and shorelands of the first class-- Preference right of upland owner--How exercised.

RCW 79.94.260: Second class shorelands--Sale or lease when in best public interest--Preference right of upland owner--Procedure upon determining sale or lease not in best public interest or where transfer made for public use--Platting.

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

RCW 79.95.010: Lease of beds of navigable waters.

[Note: The full text of these RCWs is printed above under *Lease of tidelands and shorelands* and *Lease of bedlands*.]

WAC 332-30-122: Aquatic land use authorization.**(1) General requirements.**

(a) In addition to other requirements of law, aquatic land activities that interfere with the use by the general public of an area will require authorization from the department by way of agreement, lease, permit, or other instrument.

(ii) The beds of navigable waters may be leased to the owner or lessee of the abutting tideland or shoreland. This preference lease right is limited to the area between the landward boundary of the beds and the -3 fathom contour, or 200 feet waterward, whichever is closer to shore. However, the distance from shore may be less in locations where it is necessary to protect the navigational rights of the public.

Discussion on use authorizations: preference rights for leasing

In summary of the RCWs and WAC above:

- # The owner of uplands abutting first class or second class tidelands or shorelands has a limited preference right for leasing those lands. Before leasing a parcel of tidelands or shorelands, the department must notify the abutting upland owner (or owners, if the aquatic parcel abuts several upland parcels) of the fair market rental value at which the land may be leased. That owner then has 60 days, in the case of first class tidelands and shorelands, or has 30 days, in the case of second class tidelands and shorelands, to apply for a lease at that rental amount. If the upland owner does not apply within that time or does not follow through on leasing the parcel, the preference

right is lost, after which the department may lease the land to any person.

- # The owner of uplands abutting unplatted first class tidelands or shorelands has a slightly different limited preference right. These lands may be leased to this owner by the same process as above, but such a lease may be terminated upon 90 days notice if the department decides it is in the best interests of the state to survey and plat the lands.
- # Bedlands may be leased only to the owner of abutting private tidelands or shorelands or the lessee of abutting public tidelands or shorelands. However, this does not apply in harbor areas. SEE ALSO: Harbor areas. Note that the right to lease is limited by the need to protect navigation.
- # If the abutting tidelands, shorelands, or uplands are not improved or occupied, the department may lease the bedlands to any person for log booming purposes.

All these leasing preferences apply only if the department determines it to be in the best interest of the state to lease the land at all. That is, the preference right is not an automatic right for anyone to lease abutting state-owned aquatic lands if the department does not make that determination. Also, all applications to lease state-owned aquatic lands will be judged by the same standards, regardless of whether the application is from an abutting owner or lessee who may have a preference right.

USE AUTHORIZATIONS: PROCESS STEPS**Discussion on use authorizations: process steps**

The process for considering and preparing a use authorization includes a variety of steps for review and

evaluation along with steps for document preparation. Much of the latter is contained in the Use Authorization Training Manual (sometimes referred to as the Gordon Thomas Honeywell manual) and the Use Authorization Desk Manual. In general, the process includes:

- Receipt of the initial application, discovery of a project through SEPA or other regulatory review process, and/or discovery of a trespass. This should include confirmation that the project is located on state-owned aquatic lands.
- Initial screening for acceptance of the application. The applicant will be expected to provide the information necessary for the department to fairly evaluate the application.
- Coordination with other Divisions of the department for consideration of any upland portion of the same proposal.
- Coordination with other agencies, as appropriate. SEE ALSO: Regulatory agencies and permits.
- Determination of the appropriate level of notification and decision-making within the department, and the relevant roles for the Region, the Division, and Executive Management. SEE ALSO: Chapter Two, Delegation of authority.
- Initial calculation of a potential valuation, proposed contract duration, and other special terms or conditions. SEE ALSO: Rent; Valuation.
- Consideration of all reasonable alternative uses.
- If additional guidance beyond this manual is needed, obtaining appropriate Executive Management review and guidance.
- Preliminary negotiation with the applicant, if appropriate.

- Obtaining the necessary department approvals before making formal or informal commitments to the applicant. If the lease is especially complicated or controversial, or if extensive negotiation will be needed with the applicant, it may be appropriate to send a preliminary recommendation to the Region Manager, Supervisor or Commissioner before staff prepares a final lease document.
- If the proposal receives preliminary approval pending final determination of value, determine the preferred method of setting valuation. SEE ALSO: Rent; Valuation.
- If the proposal receives preliminary approval pending final negotiation with the applicant, then final negotiation with the applicant.
- If the proposal receives final approval, then preparing necessary documents to execute the use authorization and obtaining signatures and payments. It should be made clear to the applicant that the contract is not valid until all proper signatures, payments, and similar requirements are completed.
- If the use authorization is executed, administering the terms of the contract over time and responding to breaches or other events. SEE ALSO: Unauthorized uses.
- Notifying the applicant and any other interested parties of the decision, regardless of whether the proposal was approved or disapproved.
- Preparing a Record of Decision, regardless of whether the proposal was approved or disapproved.

The Use Authorization Desk Manual and the Use Authorization Training Manual should be followed for

specific instructions and procedures on collecting and completing the appropriate documents.

USE AUTHORIZATIONS: RECORD KEEPING

Discussion on use authorizations: record keeping

Decisions to approve or deny a use authorization must be thoroughly documented and accessible in department files. The agency files on specific use authorizations must include all relevant documents pertaining to each use authorization, including any drafts and handwritten comments, documentation of decisions and rationale, site and vicinity maps, photos, blueprints, surveys, and plans of operations.

All information related to a given use authorization — including the department's lease or easement documents, and the data and records required by regulatory agencies — should use the same references and geographic coordinates. Documents should be cross-referenced, and duplication should be minimized.

The official file on each use authorization is maintained in the Land Records Office in Olympia. Region files should also be maintained for easy access. Region staff should routinely reconcile these files, to ensure they are working with the most up-to-date information.

The department will establish routine and random auditing to assure compliance with conditions specified in use authorizations, and to assure that records are kept appropriately.

The department will compile an annual report to executive management on all use authorizations on state-owned aquatic lands, including information relevant to reporting and

monitoring timelines. One of the purposes of this annual report is to help the department and other agencies determine total and cumulative impacts from these uses to state-owned aquatic lands.

USE AUTHORIZATIONS: REGULATORY PERMITS

WAC 332-30-122: Aquatic land use authorization.

(1) General requirements

(c) All necessary federal, state and local permits shall be acquired by those proposing to use aquatic lands. Copies of permits must be furnished to the department prior to authorizing the use of aquatic lands. When evidence of interest in aquatic land is necessary for application for a permit, an authorization instrument may be issued prior to permit approval but conditioned on receiving the permit.

Discussion on use authorizations: regulatory permits

Regulatory requirements are the minimum standard for use of state-owned aquatic lands. Within its proprietary authority, the department can and will exceed regulatory requirements when necessary to uphold its statutory obligations in managing state-owned aquatic lands. SEE ALSO: Regulatory agencies and permits.

USE AUTHORIZATIONS: RE-LEASING

RCW 79.94.280: First class unplatted tide or shore lands-- Lease preference right to upland owners--Lease for booming purposes.

RCW 79.94.290: Second class tide or shore lands--Lease for booming purposes.**RCW 79.94.320: Tide or shore lands of the first or second class--Failure to re-lease tide or shore lands--Appraisal of improvements.****RCW 79.95.040: Lease of beds of navigable waters--Preference right to re-lease.**

[Note: The full texts of these RCWs is printed above under *Lease of tidelands and shorelands* and *Lease of bedlands*.]

Discussion on use authorizations: re-leasing

In summary of these RCWs:

- # For unplatted first class tidelands or shorelands, the lessee has the preference to re-lease for up to five years.
- # For second class tidelands or shorelands leased for booming purposes, the lessee has the preference to re-lease for up to five years.
- # For bedlands, the lessee has the preference to re-lease, under the same rules as for the original lease.

As with the original leases, all these re-leasing preferences apply only if the department determines it to be in the best interest of the state to lease the land at all. That is, the preference right is not an automatic right for anyone to re-lease abutting state-owned aquatic lands if the department does not make that determination. Also, the department may require new conditions or terms in the re-lease to account for environmental concerns or other issues that are apparent at the time of re-lease.

Re-leases will follow the same general rules and procedures as for new leases. An application for re-lease must be judged based on current land management standards, not the

standards that applied when the original lease was granted. This often may mean that the existing structures or operations of the lessee will need to be improved or upgraded to meet current statutes, regulations, and policies. While it may inconvenience lessees, or even discourage some from re-leasing, this requirement is essential for continuously improving the management of aquatic lands under the department's stewardship and for meeting the department's statutory obligations.

Lessees in harbor areas and lessees for shellfish cultivation and aquaculture have slightly different re-lease rules. SEE ALSO: Harbor areas; Aquaculture.

Some older leases include a contractual preference right to re-lease. Contractual preference rights should not be included in future leases. Staff should check the specifics of the contract to determine the obligations of the lessee and the department. Unless prohibited by specific clauses in the contract, the department should require that the lease be upgraded to current land management standards.

If a lessee fails to re-lease tidelands or shorelands, the improvements on those lands either will be sold to the new lessee or, if the lands are not leased for three years, will become the property of the state and be managed by the department. SEE ALSO: Improvements.

USE AUTHORIZATIONS: TYPES OF AUTHORIZATIONS**Discussion on use authorizations: types of authorizations**

The department can grant several types of authorization instruments, including:

- # Leases
- # Easements, or rights-of-way

Rights-of-Entry

A lease is the most comprehensive type of authority granting use of state-owned aquatic lands. A lessee gains the general right to use the lands for the purposes described in the lease, subject to other specific provisions of the lease. Leases, rather than other forms of use authorization, should be used when the lessee requires essentially exclusive use of the leased lands. One typical provision allows the department to grant other uses of the leased land, such as an easement, but only if these uses will not unreasonably interfere with the lessee's use. The term "lease" is commonly used to refer to all types of use authorizations, even if they are actually easements or rights-of-entry.

An easement, also known as a right-of-way, is a more limited grant of authority to use state-owned aquatic lands. Easements are typically provided for utility lines or similar uses which do not fully encumber the land. In other words, the department may still be able to authorize other uses on the land. Easements may be granted across already leased lands, so long as the easement does not unreasonably interfere with the lease. The area covered by an easement will normally be ten feet wider than any structure placed in the easement.

A right-of-entry grants a temporary revocable license for the licensee to enter the property for limited purposes. This license is not exclusive to the licensee, and the department may grant similar rights in the same area to another licensee. Rights-of-entry are typically used when the licensee requests to use the property only temporarily.

A right-of-entry may sometimes be granted when a licensee wishes to install a structure or equipment. If this structure or equipment will remain after the right-of-entry expires, and the structure or equipment would normally require authorization, then a subsequent lease or easement is required. For example, a party may request a right-of-entry to a large area of aquatic lands in order to construct a project

which ultimately will encumber only a smaller area. In this case, the final lease or easement need only cover the smaller area. The department will not authorize a right-of-entry which is associated with a lease or easement until that lease or easement is also agreed to and finalized, except with Executive Management approval. Executive Management approval will most commonly be given for public utility lines. SEE ALSO: Utility lines.

USE AUTHORIZATIONS: UNAUTHORIZED USES

Discussion on use authorizations: unauthorized uses

If a lessee uses state-owned aquatic lands in a manner contrary to their authorization, or damages or removes valuable materials from leased state-owned aquatic lands when the damage or removal is not authorized by the lease, the lessee could be charged with a misdemeanor. For more information on trespass, waste, damage, removal of materials, and unauthorized use and occupancy on state-owned aquatic lands, SEE ALSO: Unauthorized uses.

USE AUTHORIZATIONS: WITHHOLDING LANDS FROM LEASING

RCW 79.90.460: Aquatic lands--Preservation and enhancement of water-dependent uses--Leasing authority.

(3) The department shall consider the natural values of state-owned aquatic lands as wildlife habitat, natural area preserve, representative ecosystem, or spawning area prior to issuing any initial lease or authorizing any change in use. The department may withhold from leasing lands which it finds to have significant natural values, or may provide within any lease for the protection of such values.

Discussion on use authorizations: withholding lands from leasing

A key part of the department's broad proprietary authority is the authority **not** to lease lands or restrict leases in order to protect significant natural values of state-owned aquatic lands. The department will require all conditions necessary to ensure protection of the aquatic environment. SEE ALSO: State-owned aquatic lands; Reserves, aquatic; Environmental protection.

Utility lines

RCW 79.91.130: Right of way for utility pipelines, transmission lines, etc.

A right of way through, over and across any tidelands, shorelands, beds of navigable waters, oyster reserves belonging to the state, or the reversionary interest of the state in oyster lands may be granted to any person or the United States of America, constructing or proposing to construct, or which has heretofore constructed, any telephone line, ditch, flume, or pipeline for the domestic water supply of any municipal corporation or transmission line for the purpose of generating or transmitting electricity for light, heat or power.

RCW 79.91.140: Right of way for utility pipelines, transmission lines, etc.--Procedure to acquire.

In order to obtain the benefits of the grant made in RCW 79.91.130, the person or the United States of America constructing or proposing to construct, or which has heretofore constructed, such telephone line, ditch, flume, pipeline, or transmission line, shall file, with the department of natural resources, a map accompanied by the field notes of the survey and location of such telephone line, ditch, flume, pipeline, or transmission line, and shall make payment therefor as provided in RCW 79.91.150. The land within the right of way shall be limited to an amount necessary for the construction of said telephone line, ditch, flume, pipeline, or transmission line sufficient for the

purposes required, together with sufficient land on either side thereof for ingress and egress to maintain and repair the same. The grant shall also include the right to cut all standing timber outside the right of way marked as danger trees located on public lands upon full payment of the appraised value thereof.

RCW 79.91.150: Right of way for utility pipelines, transmission lines, etc.--Appraisal--Certificate--Reversion for nonuser.

On the filing of the plat and field notes, as provided in RCW 79.91.140, the land applied for and any improvements included in the right of way applied for, if any, shall be appraised as in the case of an application to purchase state lands. Upon full payment of the appraised value of the aquatic land applied for, or upon payment of an annual rental when the department of natural resources deems a rental to be in the best interests of the state, and upon full payment of the appraised value of any danger trees and improvements, if any, the department shall issue to the applicant a certificate of the grant of such right of way stating the terms and conditions thereof and shall enter the same in the abstracts and records in the office of the commissioner of public lands, and thereafter any sale or lease of the lands affected by such right of way shall be subject to the easement of such right of way: PROVIDED, That should the person or the United States of America securing such right of way ever abandon the use of the same for the purposes for which it was granted, the right of way shall revert to the state, or the state's grantee.

WAC 332-30-122: Aquatic land use authorization.

All requirements in this section shall apply to the department. Subsection (2) of this section (except subsection (2)(a)(iii) and (b)(iii) of this section), subsections (3)(a), and (4)(a) shall apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(1) General requirements.

(b) Determination of the area encumbered by an authorization for use shall be made by the department based on the impact to public use and subsequent management of any remaining unencumbered public land.

(iii) Areas for utility line easements will normally be ten feet wider than the overall width of the structure(s) placed in the right of way.

Discussion on utility lines

Utility lines are one form of linear project and one form of nonwater-dependent use. SEE ALSO: Linear projects; Nonwater-dependent uses. Outfalls may require additional conditions to account for greater potential environmental impacts. SEE ALSO: Outfalls.

The department will grant a right-of-way for utility lines across state-owned aquatic lands upon payment of full market value for the right of way and for any damage to affected aquatic lands. SEE ALSO: Valuation.

In granting an easement for utility line, the department may require terms in the easement to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations and the public benefits of state-owned aquatic lands. In reviewing these applications, the department should apply the same standards as for other linear projects or nonwater-dependent uses. SEE ALSO: Public benefits; Navigation; Environmental protection.

Ideally, the department should be involved in advance in the design and permitting process to create and take advantage of opportunities to improve the utility line design. In fact, the department should consult with state and local agencies on their capital project plans at least five years in advance of construction. If possible, the department should also consider alternate locations where a utility line could be located to serve the same purpose with lesser impacts. If a utility line requires regulatory environmental permits, these must be granted before the department will issue the final easement document. SEE ALSO: Regulatory agencies and permits.

Damages for which payment is due include both the initial impacts associated with construction of a utility line and any impacts which occur later as a direct result of the utility line. For example, damages would be due for digging a trench, and for any major or chronic spill that disrupted aquatic habitat. Damage payments may be in the form of non-monetary habitat or environmental enhancements, or public access, if approved by the department. The easement must include a mechanism for obtaining damage payments after initial construction of the utility line.

Utility line easements will be granted for up to 30 years. Like other linear projects, the department will require re-opener clauses that allow the department to re-evaluate relevant aspects of the lease at least every ten years to respond to unexpected navigational or environmental concerns. Where appropriate, the re-opener clause should be tied to the schedule of applicable regulatory environmental reviews. If an easement is reopened, the department will require that the government agency cover the costs of any necessary review or utility line alterations.

UTILITY LINES: PUBLICLY-OWNED

RCW 79.90.465: Definitions.

(10) "Public utility lines" means pipes, conduits, and similar facilities for distribution of water, electricity, natural gas, telephone, other electronic communication, and sewers, including sewer outfall lines.

RCW 79.90.470 Aquatic lands -- Use for public utility lines -- Use for public parks or public recreation purposes -- Lease of tidelands in front of public parks.

The use of state-owned aquatic lands for public utility lines owned by a governmental entity shall be granted without charge by an agreement, permit, or other instrument if the use is consistent with the purposes of RCW 79.90.450 through 79.90.460 and does not obstruct navigation or other public uses. Use for public parks or public recreation purposes shall be granted without charge if

the aquatic lands and improvements are available to the general public on a first-come, first-served basis and are not managed to produce a profit for the operator or a concessionaire. The department may lease state-owned tidelands that are in front of state parks only with the approval of the state parks and recreation commission. The department may lease bedlands in front of state parks only after the department has consulted with the state parks and recreation commission.

Discussion on utility lines: publicly owned

Government entities will receive easements for utility lines free of charge, as long as they meet the same standards as other utility lines. This will include terms in the easement to provide for navigation and commerce, ensure environmental protection, and provide for the department's other statutory obligations and the public benefits of state-owned aquatic lands. Note that a “public utility line” is granted a free easement only if it is actually owned by a government; that is, lines that serve the general public but are owned by a private company require full payment. Public utility lines include outfalls. SEE ALSO: Outfalls.